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• *Empathy & Justice* •

EMPATHETIC JUDGING AND THE RULE OF LAW

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POP QUIZ[1]

In which of the following excerpts from U. S. Supreme Court opinions is empathy employed? Circle all that apply.

a) We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. (*Plessy v. Ferguson*).[2]

b) Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing. (Justice Blackmun's dissent in *DeShaney v. Winnebago County Dept of Social Services*).[3]

c) It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to

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1 Answers will be discussed throughout this essay. *See also* The "Empathy" Exam, http://althouse.blogspot.com/2009/06/empathy-exam.html (June 13, 2009, 10:29AM) (Ann Althouse's Constitutional Law exam question on identifying empathy).

2 163 U.S. 537, 551 (1896).

3 489 U.S. 189, 213 (Blackmun, J., dissenting).

pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form. (*Gonzales v. Carhart*).[4]

d) I've got suspicion that some drug is on this kid's person. My thought process is I would rather have the kid embarrassed by a strip search, if we can't find anything short of that, than to have some other kids dead because the stuff is distributed at lunchtime and things go awry. (Justice Souter, at the oral argument in *Redding v. Safford United School District*).[5]

e) Private suits against unconsenting states . . . present the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties . . . Not only must a State defend or default but also it must face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor. (*Alden v. Maine*).[6]

THE EMPATHY DEBATE

From the moment presidential candidate Obama announced his desire to appoint empathetic judges, a contentious and often frustrating debate was inevitable. The debate was bound to be frustrating because empathy is a term with no fixed meaning.[7] It was bound to be contentious because the notion of empathy in judging appears to conflict with the ideal of the rule of law.

Recent Supreme Court confirmation hearings have been dominated by a radically oversimplified view of the rule of law.[8] The view is that judges—even Supreme Court justices—are "umpires who don't make the rules, they apply them."[9] If one accepts this view that law can be discovered and applied

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4 550 U.S. 124, 159-160 (2007).

5 Transcript of Oral Argument at 43-44, Safford Unified Sch. Dist. #1 v. Redding, No. 08-479, 2009 WL 1789472 (Apr. 21, 2009) *available at* http://www.supremecourtus.gov/ oral_arguments/argument_transcripts/08-479.pdf.

6 527 U.S. 706, 749 (1999).

7 And to compound the definitional problem, President Obama's use of the term shifted subtly in later addresses on the subject. See *infra* note 66.

8 Judge Posner observes that "[n]either [Roberts] nor any other knowledgeable person actually believed or believes that the rules that judges in our system apply, particularly appellate judges and most particularly the justices the U.S. Supreme Court, are given to them the way the rules of baseball are given to umpires." RICHARD A. POSNER, HOW JUDGES THINK 78 (2008).

9 Susan Bandes, *We Lost it at the Movies: The Rule of Law goes from Washington to Hollywood and Back Again*, 40 LOY. L.A. L. REV. 621, 621, 622 n.6 (citing Roberts confirmation hearings).

without interpretation, it follows that judges should not allow their prior experiences, perceptions or beliefs to influence their decisions, and that instead a Supreme Court justice should be "transformed" into "a different person" upon taking the judicial oath, a person who simply does "what the law requires in every single case."[10] Judicial candidates who acknowledge the influence of prior experience or beliefs are, in this view, acknowledging improper ideological bias.[11]

Obama's statement on the campaign trail that "we need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom. . .[and] to understand what it's like to be poor, or African-American, or gay, or disabled, or old,"[12] was an explicit rejection of this view of the Court's role. Obama made the statement in a speech to Planned Parenthood. He prefaced it with critical remarks about Justice Kennedy's opinion in the recent partial birth abortion case, and about the shallowness of the Roberts confirmation hearing. It amounted to a declaration that Supreme Court justices do have interpretive philosophies, that it is legitimate to take them into account, and that Obama intends to appoint justices with a different set of values.

These remarks, followed by others about the value of empathy, created a firestorm, fanned by Judge Sotomayor's acknowledgment that her background and worldview shape her jurisprudence. Because the concepts of *empathy* and *the rule of law* are both moving targets, many scholars and pundits seem to be talking past one another. Nevertheless, a remarkable and long-overdue conversation is unfolding about judicial character and how it ought to affect decision-making. This essay addresses some of the definitional ambiguities that make constructive debate so difficult.

In addition, the essay argues that it is misleading to discuss *whether* judges should exercise empathy. They should, and they inevitably do. The questions are *for whom* they exercise it, how accurately they exercise it, how aware they are of their own limitations and blind spots, and what they do to cor-

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10 *Id.* at 621, 622 n.2 (citing Alito confirmation hearings).

11 At the same time, the popular understanding of the rule of law is oddly schizophrenic. This so called "ideal" conception "works in tandem with the conception of law as 'a pragmatic, perhaps vulgar, account of the routine practices of biased, differentially endowed, and fallible actors.'" *Id.* at 648 (citing PATRICIA EWICK & SUSAN SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE 226-27 (1998)). *See also* Keith J. Bybee, The Rule of Law is Dead! Long Live the Rule of Law (Mar. 27, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1404600.

12 Senator Barack Obama, Campaign speech to Planned Parenthood (July 2007) (cited in William Safire, *Zombie Banks*, N.Y. TIMES, May 17, 2009 at 26).

rect for those blind spots.

EMPATHY VERSUS SYMPATHY

Empathy, as the term is most commonly used,[13] is the ability to take the perspective of another,[14] or "an imaginative leap into the mind of others."[15] Empathy is a capacity, not an emotion. It differs from sympathy or compassion, both of which are emotions. Empathy entails understanding another person's perspective. Sympathy is a feeling *for* or *with* the object of the emotion.[16] Empathy does not require, or necessarily lead to, sympathy.[17] Empathy, unlike sympathy, does not necessarily lead to action on behalf of its object, or the desire to take action on his behalf.[18] Justice Blackmun's famous "Poor Joshua" lament in *DeShaney* is a good example of an expression of sympathy. It reflects not just empathetic understanding of Joshua's perspective, but a visceral sense that Joshua had been dealt with unjustly and deserved a different outcome.

As Dr. Michael Franz Basch, a psychotherapist and prominent scholar on the topic of empathy, observes:

> Empathy is first and foremost a capacity. Strictly thinking, it is value-free. Empathic thinking. . .is a function that the human brain at a certain level of development is potentially capable of performing, no more and no less. This is often not understood, and empathy becomes confused with altruism and other-directedness, though it need not be employed in the service of either goal. . .*What one does with the insight provided by empathic understanding remains to be determined by the nature of the relationship between the people involved and the purpose for which the empathic capacity*

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13 *See* Susan Bandes, *Empathy, Narrative and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 373 & n.52 (1996) (discussing the term empathy as a moving target).

14 PAUL BLOOM, DESCARTES' BABY 113 (2004); CANDACE CLARK, MISERY AND COMPANY: SYMPATHY IN EVERYDAY LIFE 34 (1997).

15 CLARK, *supra* note 14. Clark distinguishes among several types of empathy: cognitive, emotional and physical. *Id.* at 38. Cognitive empathy is perspective-taking. The rarer emotional empathy, a kind of emotional contagion, "makes us experience others' suffering as our own." *Id.* Others make different distinctions. The safest course of action with empathy is to clarify one's use of the term at the outset.

16 *Id.* at 44-45.

17 BLOOM, *supra* note 14, at 118.

18 Conversely, it is possible to feel compassion or pity for someone without really understanding his perspective. DANIEL GOLEMAN, SOCIAL INTELLIGENCE: THE NEW SCIENCE OF HUMAN RELATIONSHIPS 62 (2006).

was engaged by its user in the first place.[19]

A psychotherapist uses empathy to promote the goals of therapy—trust, healing, self-knowledge. A judge uses empathy as a tool toward understanding conflicting claims. Empathy assists the judge in understanding the litigants' perspectives. It does not help resolve the legal issue of which litigant ought to prevail.

JUST ONE TOOL IN THE JUDICIAL TOOLBOX

Judge Posner describes empathy as one of several important tools in the judge's toolbox. Posner argues that when faced with legal questions lacking determinative answers, judges need to consult good judgment, which he defines as "an elusive faculty best understood as a compound of empathy, modesty, maturity, a sense of proportion, balance, a recognition of human limitations, sanity, prudence, a sense of reality and common sense." [20] In the context of judicial decision-making, empathy is an essential capacity for understanding what's at stake for the litigants. Ideally, a judge will have the capacity to put herself in the shoes of all those with a stake in her ruling.

Those who are concerned by Obama's call for empathetic judges often assume that he means for judges to decide cases *entirely* by means of empathy. They assume that empathy will drive or override, rather than inform, judicial judgment.

The notion of empathy—and of the importance of background—has often been raised before without evoking such criticism. Judicial nominees and their supporters have long assured Congress that they *both* intend to uphold the rule of law *and* are capable of empathy for those less fortunate. Clarence Thomas's controversial nomination to the Supreme Court got a crucial boost when liberal judge Guido Calabresi wrote that Thomas understands "what discrimination really means" and knows "the deep needs of the poor and especially poor blacks."[21] Senator Danforth, after reading Judge Calabresi's remarks into the Congressional Record, added his own assurances that Thomas's heart would be with "the ordinary

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19 Michael Franz Basch, *Empathic Understanding: A Review of the Concept and Some Theoretical Considerations*, 31 J. AM. PSYCHOANALYTIC ASS'N 101, 119, 123 (1983) (emphasis added).

20 POSNER, *supra* note 8, at 117.

21 137 Cong. Rec. S14283-03 (1991).

folk" if he were on the Supreme Court.[22] In his confirmation hearings, Samuel Alito sought to reassure those concerned about his capacity to empathize with workers and the poor by describing his Italian-immigrant father and his own upbringing in "an unpretentious, down to earth community." Senator Dewine added his assurances that "Judge Alito. . .understands that judicial opinions affect real people and have real consequences." He went on to quote Alito's own words, in a passage that has been widely circulated:

> When I have cases involving children, I can't help but think of my own children. When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender, and I do take that into account.[23]

One can only speculate about why President Obama's evocation of empathy has been treated so differently. There was no suggestion that Justice Thomas or Justice Alito would decide cases based *solely* on empathy, without reference to governing law or other constraints. That distinction is frequently elided in the current debate.

BLIND JUSTICE AND MINDBLINDNESS

One pundit expressed the widely held sentiment that "Lady Justice doesn't have empathy for anyone. She rules strictly based upon the law and that's really the only way that our system can function properly under the Constitution."[24] But in fact it should be uncontroversial that judges need empathy. Empathy builds on the understanding (known as *theory of mind*)[25] that others are separate from us, with separate mental states, desires, beliefs and perceptions.[26] The inability to "apprehend what seems to be going through someone else's mind" is called mindblindness.[27] Empathy helps us to under-

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22 *Id.*

23 *Meeting of the Senate Judiciary Committee Subject: The Nomination of Samuel Alito to the Supreme Court,* FEDERAL NEW SERVICE, Jan. 24, 2006.

24 Jessica Weisner, *Define Empathy: The Next SCOTUS Pick*, TALKING POINTS MEMO, May 22, 2009 (quoting Wendy Long of the Judicial Confirmation Network), *available at* http://tpmcafe.talkingpointsmemo.com/talk/blogs/rac/2009/05/define-empathy-the-next-scotus.php.

25 JAAK PANKSEPP, AFFECTIVE NEUROSCIENCE: THE FOUNDATIONS OF HUMAN AND ANIMAL EMOTIONS 276 (1998).

26 William D. Casebeer, *Moral Cognition and its Neural Constituents*, 4 NATURE REVS. NEUROSCIENCE 840, 844 (2003).

27 GOLEMAN, *supra* note 18, at 135.

stand what others are thinking, feeling and perceiving, and to predict how others will react. It is an essential capacity for living in the social world, and a basic component of moral reasoning.[28] A lack of empathy is one of the deficits associated with autism in children.[29] A total lack of empathy, coupled with an equally total lack of remorse, is the main defect of psychopaths.[30]

The law aims to channel and influence human behavior. To apply the law, judges must constantly seek to understand and predict motivations, intentions, perceptions, and other aspects of human conduct. Empathy makes that understanding possible.

MISTAKING SELECTIVE EMPATHY FOR UNBIASED JUDGING

Judges often face litigants from backgrounds with which they are familiar and comfortable. Their perspective-taking on behalf of such litigants is so natural it is unlikely to be coded as empathy at all. We tend to reserve the term for the more difficult feat of understanding the perspectives of those from very different backgrounds. Those who spend their days surrounded by people with shared backgrounds, assumptions and perspectives may mistake their own perspective for the universal. This mistake is an occupational hazard for judges, who are encouraged by the trappings of their role to speak in a universal voice[31] and to regard themselves as taking "the view from nowhere."[32]

Consider, for example, Jeffrey Toobin's recent articles about the background and jurisprudence of Chief Justice Roberts. Roberts sees himself as an umpire, calling them as he sees them, unhampered by a preconceived world view. Yet Toobin observes that:

> After four years on the Court. . . Roberts's record is not that of a humble moderate but, rather, that of a doctrinaire conservative. . . In every major case since he became the nation's seventeenth Chief Justice, Roberts has sided with the

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28 Casebeer, *supra* note 26, at 844.

29 BLOOM, *supra* note 14, at 28-29.

30 John Seabrook, *Suffering Souls: The Search for the Roots of Psychopathy*, THE NEW YORKER, Nov. 10, 2008, *available at* http://www.newyorker.com/reporting/2008/11/10/081110fa_fact_seabrook?currentPage=1.

31 Bandes, *supra* note 13, at 377; Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 204-208 (1990).

32 THOMAS NAGEL, THE VIEW FROM NOWHERE (1989).

> prosecution over the defendant, the state over the condemned, the executive branch over the legislative, and the corporate defendant over the individual plaintiff. Even more than Scalia, who has embodied judicial conservatism during a generation of service on the Supreme Court, Roberts has served the interests, and reflected the values, of the contemporary Republican Party.[33]

An article published at the time of Roberts' confirmation hearing concluded that Roberts' world view seemed set at an early stage. It recounts an upbringing in a conservative community and schooling at an elite boarding school, both of them wealthy, nearly all white, and insulated from the political and social turmoil of the sixties and seventies. It describes a father who was an executive for a steel company that was hit with sex and race discrimination claims. It describes Roberts himself as consistent and steadfast in his conservative views from an early age.[34] Toobin reports that in private practice and in the first Bush Administration, a substantial portion of Roberts' work consisted of representing the interests of corporate defendants who were sued by individuals.[35]

Toobin recounts the following anecdote: As Chief Justice, Roberts was charged with preparing an annual report to Congress. In 2006,

> he devoted his entire report to arguing for raises for federal judges, and he even went so far as to call the status quo on salaries a "constitutional crisis. . .This request to Congress was universally popular among Roberts' colleagues . . .Congress, however snubbed the Chief Justice. Six-figure salaries, lifetime tenure, and the opportunity to retire at full pay did not look inadequate to the elected officials, who make the same account as judges, and must face ordinary voters. Roberts's blindness on the issue may owe something to his having inhabited a rarefied corner of Washington for the past three decades.[36]

The point of the anecdote, as Toobin makes clear, is not that the Chief Justice was wrong in some substantive sense about the need for raises, but that he failed to realize the narrowness of his own perspective. The larger point is not that Roberts has the wrong judicial philosophy, but that he denies having *any* legal philosophy. It is not that his world view has a

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33 Jeffrey Toobin, *No More Mr. Nice Guy: The Supreme Court's Stealth Hard-Liner*, THE NEW YORKER, May 25, 2009, at 42.

34 Amy Goldstein and R. Jeffrey Smith, *Midwestern Scholar with a Steady Conservative Bent*, WASH. POST, Sept. 4, 2005, at A06. I thank Mary Ann Case for bringing this article to my attention.

35 Toobin, *supra* note 33.

36 *Id.*

deleterious effect on his jurisprudence, but that he denies it has any effect on his jurisprudence. This sort of selective empathy is the most dangerous. Because it mistakes its own perspective for "the view from nowhere," it fails to seek out other perspectives.

When commentators critique the call for judicial empathy, they often assume that run-of-the-mill judging is empathy-free. It is this assumption that leads to the charge that "empathy is simply a code word for judicial activism."[37] If empathy always runs toward the poor and the disenfranchised, and if decisions in favor of the privileged and the powerful are simply unmarked judging, then empathy is activist. But in fact the justices often exercise empathy on behalf of governmental officials, including other judges. Justice Rehnquist, discussing why judges have afforded themselves absolute immunity from civil rights suits while denying it to so many other government officials, suggested that:

> If one were to hazard an informed guess as to why such a distinction in treatment between judges and prosecutors, on the one hand, and other public officials on the other, obtains, mine would be that those who decide the common law know through personal experience the sort of pressures that might exist for such decisionmakers in the absence of absolute immunity, but may not know or may have forgotten that similar pressures exist in the case of nonjudicial public officials to whom difficult decisions are committed.[38]

The justices frequently exhibit empathy for corporate defendants and other powerful litigants. As I've discussed elsewhere, in *University of Alabama v Garret* the Court showed far more empathy for the state university dragged into court against its will than it did for Patricia Garrett, who was illegally fired by the University for taking a medical leave while she battled breast cancer.[39]

In a widely quoted opinion piece in the Wall Street Journal, John Hasnas argued that:

> [I]n general, one can feel compassion for and empathize with individual plaintiffs in a lawsuit who are facing hardship. They are visible. One cannot feel compassion for or empathize with impersonal corporate defendants, who, should they incur liability, will pass the costs on to consumers, reduce their output, or cut employment. Those who must pay more for products, or are unable to obtain

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37 Weisner, *supra* note 24 (quoting Wendy Long).

38 Butz v. Economou, 438 U.S. 478, 529 (1978) (Rehnquist, J., dissenting).

39 Susan Bandes, *Fear and Degradation in Alabama: The Emotional Subtext of University of Alabama v. Garrett*, 5 U. PA. J. CONST. L. 520 (2003).

needed goods or services, or cannot find a job are invisible.[40]

It may indeed be easier to have sympathy or compassion for the poor tenant than for the wealthy landlord, or for the alleged victim of police brutality than for the accused perpetrator. This is an important point. Proximity and sympathy may steer judges wrong.[41] But empathy—when defined as the ability to take the perspective of another— is a different story. A judge may have a far easier time taking the perspective of the landlord or the police officer from a background similar to his own, than the perspective of the working-class tenant or the police-abuse victim with an arrest record.[42] Empathy for the affluent and powerful, like empathy for the poor and the disenfranchised, needs to be called by its rightful name.

EMPATHY: HAVING IT AND GETTING IT

Sol Wachtler, during his tenure as Chief Judge of the New York Court of Appeals, supported the Rockefeller drug laws with their draconian prison terms. After eight months in prison,[43] he saw things differently. Criticizing an article about prisons by Abe Rosenthal that he found superficial, Wachtler wrote "I had written and said much the same thing during the twenty-five years I served on the bench. How could *I* have been so superficial?"[44] His experience had shown him that "long prison sentences are not the answer."[45] He mused, "I would like to take Abe for a walk with me through my unit."[46] Actually walking in someone else's shoes is one way to gain perspective about the "world out there"[47]—in this case, the hard way.

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40 John Hasnas, *The Unseen Deserve Empathy Too*, WALL ST. J., May 29, 2009, at A17, *available at* http://online.wsj.com/article/SB124355502499664627.html.

41 On this point see also Susan Bandes, *Emotions, Values, and the Construction of Risk*, 156 U. PA. L. REV. PENNUMBRA 421, 426 (2008), http://www.pennumbra.com/responses/03-2008/Bandes.pdf. Hasnas' interesting central argument about proximity deserves more space than I can give it here.

42 Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1321 (1999); John Conroy, *Town Without Pity*, THE CHICAGO READER, Jan. 12, 1996, at 22 (noting that a judge may have an easier time identifying with an erect and courageous torturer than with an unpopular victim).

43 SOL WACHTLER, AFTER THE MADNESS: A JUDGE'S OWN PRISON MEMOIR 263 (1997) (telling the story of Wachtler's eleven month imprisonment after pleading guilty to harassing Joy Silverman).

44 *Id.* at 263.

45 *Id.* at 266.

46 *Id.* at 264.

47 Beal v. Doe, 432 U.S. 438, 463 (1977).

AN EXAMPLE: THE MIDDLE SCHOOL STRIP SEARCH CASE

There are other ways. Judges also learn from one another, from litigants, from amicus briefs and other sources. Consider, for example, *Safford v. Redding*,[48] the recently decided case about whether the strip search of middle-school student Savana Redding violated the Fourth Amendment. To resolve the Fourth Amendment issue, the Court needed to determine how intrusive the search was, how important the government interest was, and whether the government adopted a reasonable means of addressing its concern. To assess how intrusive such a search was, it needed to focus on how it was experienced by the litigant and on how it would be experienced by others in her place. To understand the nature of the governmental interest, it needed to put itself in the place of school administrators. Unless the Court could understand the perspectives of all the litigants, it risked making its ultimate determination based on skewed and incomplete information.

In the *Safford* argument, the justices spent substantial time examining the viewpoint of the school administrators faced with keeping students safe from dangerous drugs. Justices Roberts and Alito asked numerous questions indicating their appreciation of the difficult choice facing an administrator confronted with a tip that a student is carrying contraband. Here is Justice Souter, for example, imagining what would go through the head of the principal charged with keeping the students safe: "My thought process is I would rather have the kid embarrassed by a strip search, if we can't find anything short of that, than to have some other kids dead because the stuff is distributed at lunchtime and things go awry."[49]

The Court spent far less time during the argument trying to understand the viewpoint of the victim of the strip search. Apart from Justice Ginsburg, only Justice Breyer raised questions about her perspective. He struggled with the issue, asking for guidance,[50] but also consulting his own memory of

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48 Safford Unified School District #1 v. Redding, No. 08-479, 2009 WL 1789472 (April 21, 2009).

49 Transcript of Oral Argument, Safford Unified Sch. Dist. #1 v. Redding, No. 08-479, 2009 WL 1789472 (Apr. 21, 2009), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-479.pdf.

50 Justice Breyer: I'm trying to work out why is this a major thing to say strip down to your underclothes, which children do when they change for gym, they do fairly frequently, not to—you know, and there are only two women there. Is—how bad is this, underclothes? That's what I'm trying to get at. I'm asking because I don't

changing in the locker room to try to gauge the nature of the intrusion.[51] Justice Ginsburg pointed out in response that this was no locker room suit-up, but the search of a thirteen-year-old girl forced to strip to her underwear and shake out her bra and underpants in front of school officials who suspected her of concealing prescription ibuprofen.

Judges have various means at their disposal for examining their assumptions about how the world works. Justice Breyer, commendably, knew he needed more information about how a thirteen year old girl would experience such a search. The issue was addressed in at least one amicus brief, citing studies on the effects of strip-searching children,[52] and it was addressed by counsel. Justice Breyer also consulted his own experience. Justice Ginsburg suggested that this experience did not shed much light on the intrusiveness of the strip search at issue. Empathy is not always accurate, but it can be improved, often with the help of others.

The resulting opinion reflects the Court's effort to educate itself on Redding's perspective. It acknowledges her subjective experience of the search as "embarrassing, frightening, and humiliating."[53] In determining the reasonableness of her expectation, it cites the empirical study mentioned above, which offered evidence of "the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure."[54] It acknowledges the significant difference between undressing for gym and being subjected to a strip search.[55] Finally, the Court rightly notes that "the indignity of the search does not, of course, outlaw it."[56] Its fuller understanding of Redding's perspective allowed a more accurate balancing of interests,

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know. *Id.*

51 Justice Breyer: In my experience when I was 8 or 10 or 12 years old, you know, we did take our clothes off once a day, we changed for gym, okay? And in my experience, too, people did sometimes stick things in my underwear – (laughter) Or not my underwear. Whatever. Whatever. *Id.*

52 Brief for National Association of Social Workers et al. as *Amici Curiae,* Safford Unified Sch. Dist. #1 v. Redding, No. 08-479, 2009 WL 1789472 (Apr. 21, 2009).

53 Safford Unified Sch. Dist. #1 v. Redding, No. 08-479, 2009 WL 1789472 (Apr. 21, 2009).

54 Brief for National Association of Social Workers et al., *supra* note 52.

55 The common reaction of these adolescents simply registers the obviously different meaning of a search exposing the body from the experience of nakedness or near undress in other school circumstances. Changing for gym is getting ready for play; exposing for a search is responding to an accusation reserved for suspected wrongdoers and fairly understood as so degrading that a number of communities have decided that strip searches in schools are never reasonable. *Safford*, 2009 WL 1789472, at *7.

56 *Id.*

but did not resolve the issue of how the balance should be struck.

GETTING IT WRONG

Selective empathy is inevitable. More dangerous is lack of awareness of the limits of individual perspective. Justice Kennedy's infamous language in *Gonzales v Carhart*[57] illustrates the consequences of this lack of awareness. The majority of the Court "held that a woman's decision to follow her physician's advice can be overridden by the government, based on a new principle never advanced or documented by either side in the case: protecting "the bond of love the mother has for her child."[58] Justice Kennedy asserted:

> While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow. . . It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.[59]

Here Justice Kennedy assumes rather than inquires. Courts are faced with difficult questions about how to properly assess empirical studies,[60] and about when they ought to rely on such studies.[61] But in this case Justice Kennedy simply failed to seek out accurate information.[62] An opinion like this,

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57 Gonzales v. Carhart, 550 U.S. 124 (2007).

58 National Women's Law Center, *Gonzales v. Carhart: The Supreme Court Turns Its Back on Women's Health and on Three Decades of Constitutional Law*, May 2007, *available at* http://www.nwlc.org/pdf/GonzalesvCarhart2.pdf.

59 *Carhart*, 550 U.S. at 159-160.

60 *See e.g.*, John Donohue, *Have "Woman-Protective" Studies Resolved the Abortion Debate? Don't Bet on It*, BALKINIZATION, Sept. 23, 2008, http://balkin.blogspot.com/2008/09/ have-woman-protective-studies-resolved.html (arguing that "judges and legislators must insist on greater methodological sophistication before empirical studies can illuminate legal and policy choices"). A discussion of these difficult issues is beyond the scope of this short essay.

61 Moreover, the Court may disagree on what empirical question is at issue. See for example the opinions in *Kennedy v. Louisiana*, the case involving whether the death penalty may be imposed for child rape. Both Justice Kennedy's majority opinion and Justice Alito's dissent cited empirical studies, but the former focused on the effects of a death penalty prosecution on the child victim, 128 S. Ct. 2641, 2662 (2008), and the latter focused on the effects of the rape itself, 128 S. Ct. 2641, 2677 (2008) (Alito, J., dissenting).

62 *See e.g.*, Nada L Stotland, MD, MPH, *The Woman-Protective Strategy as a*

larded with phrases like "we find no reliable data" and "it seems unexceptionable to conclude" and "it is self-evident," reflects not just a failure of empathy, but a failure to comprehend the need for it. Or as Jeffrey Rosen tartly observed, "Kennedy. . .prefers romantic generalizations about 'real people' to listening to them."[63]

We all use empathy, and despite our best intentions, it is always selective and riddled with blind spots. We can try to correct for this partiality if we are self-aware. But those who study cognitive psychology and decision-making find that we aren't all that good at identifying and critiquing our own background assumptions.[64] A better way to encourage this sort of correction is through debate with others who hold differing viewpoints. Judges, like the rest of us, make better decisions when forced to examine and articulate their assumptions. A range of backgrounds and life experiences on the Court increases the odds that those assumptions are challenged when they are off-base, or at least that no judge assumes his or her own perspective is universal. Supreme Court justices, like the rest of us, make better decisions in an atmosphere of lively debate than in an echo chamber.

"THE EMPATHY TO RECOGNIZE WHAT IT'S LIKE TO BE A YOUNG TEENAGE MOM"

Obama's statements about the sorts of judges he hopes to appoint elicited criticism from those who believe that empathy should play no role in judging. But many commentators, including several sophisticated legal scholars, were particularly troubled by Obama's stated preference for judges who would exercise empathy, not simply for all litigants, but for certain groups. Steven Calabresi, for example, expressed concern that

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Campaign of Misinformation, BALKINIZATION, Sept. 17, 2008, *available at* http://balkin.blogspot.com/ 2008/09/woman-protective-strategy-as-campaign.html; Terry A. Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 851, 888-901 (2009); *see generally* Chris Guthrie, *Carhart, Constitutional Rights, and the Psychology of Regret*, 81 S. CAL. L. REV. 877 (2008).

63 Jeffrey Rosen, Supreme Leader: The Arrogance of Justice Anthony Kennedy, THE NEW REPUBLIC, June 18, 2007, at 16, 17.

64 *See generally* Jonathan Haidt & Fredrik Bjorklund, *Social Intuitionists Answer Six Questions About Moral Psychology*, *in* 2 MORAL PSYCHOLOGY 181 (W. Sinnott-Armstrong ed., 2008), *available at* http://ssrn.com/abstract=855164 (arguing that moral judgment is a social process); Kevin M. Carlsmith & John M. Darley, *Psychological Aspects of Retributive Justice*, 40 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 193 (2008), *available at* http://ssrn.com/abstract=1031193 (arguing that discussion with others helps us identify the flaws in our own assumptions).

"Mr. Obama's emphasis on empathy in essence requires the appointment of judges committed in advance to violating [their oath to administer justice without respect to persons, and do equal right to the poor and the rich]."[65]

Assuming that empathy is an important capacity for a judge, it is still reasonable to ask why then-candidate Obama didn't come out in favor of judicial empathy toward all litigants.[66] Yet, in fact, the notion of *empathy for* stakes out important ground in the national debate about the rule of law and the role of the Supreme Court.

First, as I have discussed, the context of Obama's initial statement clarifies his message. His point was not that judges should *no longer* simply be umpires who approach each case without prior conceptions about how the world works or how the law should be interpreted. His point was that no Supreme Court justice actually behaves this way. Judges have philosophies. Judges are influenced by their background assumptions. A Supreme Court justice should have "a sharp and independent mind and a record of excellence and integrity,"[67] but that isn't the only question. Philosophy matters as well. As I've argued elsewhere:

> If a reference to judges in the mold of Justices Scalia and Thomas is used and understood as code for "judges who will simply apply the law as written and not impose their own preference" then it becomes a non-ideological act to appoint people sharing this philosophy. Under this understanding, appointing judges like Roberts and Alito is not a political act because their jurisprudence is not a philosophy at all; it is simply proper, unmarked, unbiased judging.[68]

Thus the very idea of a jurisprudential philosophy is positioned as an activist idea, and the effect is to insulate candidates like (now) Justices Roberts and Alito from any serious inquiry into their philosophies. Obama's statement rejected

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65 Steven G. Calabresi, *Obama's 'Redistribution' Constitution*, WALL ST. J., Oct. 28, 2008, at A17.

66 His later statements were less definitive about the need to have empathy for certain groups For example, just before announcing the Sotomayor nomination, he said: "I will seek somebody who understands that justice isn't about some abstract legal theory or footnote in a case book; it is about how our laws affect the daily realities of people's lives, whether they can make a living and care for their families, whether they feel safe in their homes and welcome in their own nation. I view that quality of empathy, of understanding and identifying with people's hopes and struggles, as an essential ingredient for arriving at just decisions and outcomes." Robert Gibbs, White House Press Secretary, Press Briefing (May 1, 2009), *quoted in* Joseph Williams, *Obama may break with tradition for high court pick; Retirement of Souter opens opportunities*, BOSTON GLOBE, May 2, 2009, at 8.

67 *Id.*

68 Bandes, *We Lost it at the Movies*, *supra* note 9, at 648.

this framework. It communicated his beliefs that jurisprudential philosophy is not just the province of the activist judge; that he wanted a different sort of judge; and that discussion on these matters is not only legitimate but essential.

In short, Obama was asserting that the current Supreme Court has been too one-sided in its empathy. At the same time he was articulating his own vision of the Constitution, and of the Court's role in interpreting it. He has said this explicitly. For example:

> When you look at what makes a great Supreme Court justice, it's not just the particular issue and how they rule, but it's their conception of the Court. And part of the role of the Court is that it is going to protect people who may be vulnerable in the political process, the outsider, the minority, those who are vulnerable, those who don't have a lot of clout. . .If we can find people who have life experience and they understand what it means to be on the outside, whit it means to have the system not work for them, that's the kind of person I want on the Supreme Court.[69]

We can and should debate whether we want our next Supreme Court justice to share the President's values. The important thing is not to get sidetracked, as we have in the past, by the notion that Supreme Court justices are mere technocrats who can simply apply the law without making value choices. That notion leads only to confirmation hearings in which neither Congress nor the American people are given the information they need to evaluate candidates for the highest court in the land.

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69 Senator Barack Obama, Democratic Debate in Las Vegas (Nov. 15, 2007), *available at* http://www.nytimes.com/2007/11/15/us/politics/15debate-transcript.html.